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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALTON & SOUTHERN RAILWAY COMPANY,
a Corporation,
Petitioner,

vs.

ULECIOUS BUCHANAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIFTH DISTRICT

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QUESTIONS PRESENTED

It has long been settled that the preservation for litigants in FELA cases of the right to trial by jury is an important matter whose curtailment will be closely scrutinized. This case presents two related questions concerning:

1. Whether the trial court usurped the jury's function by ordering a new trial on a ground waived by the respondent where such ruling violates the purpose of the Federal Employers' Liability Act, the Seventh Amendment to the United States Constitution, *Rogers* v. *Missouri Pacific R.R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L. Ed. 2d 493, (1957), and its progeny; and

2. Whether, in an FELA case where the trial court expressly found respondent's credibility to be the major jury issue, the trial court can overturn the jury's verdict and order a new trial on a ground not objected to or otherwise preserved by the respondent whose version of the facts was absolutely and completely rebutted by an eyewitness.

CORPORATE AFFILIATIONS

The Missouri Pacific Railroad Company and the Southern Pacific Transportation Company are corporate parents of the Alton & Southern Railway Company, petitioner. The petitioner has no other corporate parents, subsidiaries or affiliates.

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PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIFTH DISTRICT

OPINION BELOW

The opinion of the Illinois Appellate Court, Fifth District, is unreported, but is appended hereto at pages A-2 to A-8. The order denying petitioner's petition for leave to appeal to the Supreme Court of Illinois and that court's order staying the mandate of that court appear at pages A-9 to A-12.

JURISDICTION

The judgment of the Illinois Appellate Court, Fifth District, was entered on September 19, 1980. Petitioner's timely petition for leave to appeal was denied by the Supreme Court of Illinois

on January 30, 1981, and that court stayed its mandate by order entered on February 16, 1981. This petition for certiorari was filed within 90 days of denial of leave to appeal. No petitions for rehearing have been or will be filed with the state courts. This Court's jurisdiction is invoked under 28 U.S.C.§ 1257(3).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Seventh Amendment to the United States Constitution

"In Suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

35 Stat. 65, As Amended, 45 U.S.C. § 51.

> *"Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.*
>
> "Every common carrier by railroad while engaging in commerce between any of the several States and Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury

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[1] In Illinois, once the appeal process has ended relative to direct appeal of an order granting a new trial, later appeals cannot address the propriety of the grant of a new trial. *Robbins* v. *Professional Construction Co.*, 72 Ill. 2d 215, , 20 Ill. Dec. 577, 579-580, 380 N.E.2d 786, 788-789, (1978). In this circumstance, the decision below constituted a final judgment under 28 U.S.C. § 1257(3). *Miranda* v. *Arizona, 384 U.S. 436, 498, 86 S.Ct. 1602, , 16 L. Ed. 2d 694, 737, (1966).*

while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road bed, works, boats, wharves, or other equipment."

STATEMENT OF THE CASE

The Evidence

Respondent instituted this action in an Illinois State Court under the Federal Employers' Liability Act, 45 U.S.C. § 51, to recover damages for a back injury which allegedly occurred on February 22, 1976, while working as a hostler helper for petitioner railway company. (C. 2-5)

At trial, respondent testified that, on the day in question, he drove to work in his own car, but stopped at a girlfriend's home and walked the remaining 4 blocks to work — arriving at approximately 6:45 a.m. (R. 50, 71-72) He claimed he was cleaning the interior of a locomotive engine and that, thereafter, he was dismounting from the engine by means of a ladder when he slipped and fell injuring his back. (R. 54) Respondent denied having been out until 2:00 a.m. the night before his alleged fall. (R. 70-71) He stated that his foreman was not with him when he allegedly fell and he denied being discovered asleep on the locomotive engine by his foreman immediately prior to the alleged fall. (R. 97, 99, 118) Respondent's testimony was directly refuted by the foreman, Euwald Milkert, who testified that on the morning of the alleged accident, respondent appeared to be very tired and abnormally loud. (R. 237) Milkert said he

found respondent asleep on a locomotive engine and that it took him 2 attempts to awaken him. (R. 222-223) He then testified that he watched as respondent was dismounting the locomotive engine. Milkert testified that respondent did not slip or fall from the ladder on the outside of the locomotive and respondent had no difficulty whatsoever in dismounting. (R. 223-225) Shortly thereafter, respondent reported the alleged fall to Milkert. (R. 223-225)

The trial court found that respondent's credibility was a major issue in the case because he said he walked to work after leaving his automobile with a girlfriend (as opposed to arriving with a red-wigged person), he denied being in a drowsy condition that morning and there was evidence respondent was drinking and dancing far into the night and morning before the alleged fall. (R. 45C, 172D, 172G-H) The court therefore permitted petitioner to call as a witness, Dennis Korando, who was going to testify that respondent requested that he tell an acquaintance outside the railroad yard that respondent had to work that day and could not get off work to leave with the acquaintance. (R. 172D, 172E, 172F, 172G-H, 172I) The only objection made by respondent's counsel to Korando's testimony was that he was surprised by Korando, who had not previously been disclosed as a witness. (R 172A) The court overruled that objection, permitted respondent's attorney to briefly speak with the witness, and then permitted Korando to testify. (r. 172G-H) No objection was made by respondent's counsel to Korando's testimony on grounds of unfair prejudice. (R. 172A, 192) Korando said the black person in the car wore a red wig, although he could not say whether the person was male or female. (r. 192)

In his closing argument, respondent's attorney repeatedly referred to Kornado's testimony in offensive racial terms. He accused petitioner of fabricating the story about the black person waiting for respondent outside the railroad yard and he called that person a "creature" and "black thing." (R. 365-368)

Neither racial references nor offensive characterizations were made by petitioner railroad's attorney. (R. 392-393, 406-407 & 421)

At the close of trial, the jury returned a verdict in favor of the petitioner railroad and against the respondent. (R. 440-442) Thereafter, the court granted a new trial on motion by the respondent. (C. 136) The ground relied upon by the court in granting a new trial was that Dennis Korando's testimony concerning 6 foot 4 inch, 230 pound, black individual adorned in a red wig who was waiting for respondent outside the railroad yard raised a prejudicial and inflammatory inference of black homosexuality. (C. 136) This was the sole ground relied upon by the court in granting a new trial.

Respondent has adopted petitioner's factual statements before both reviewing courts in Illinois. (Respondent's Ill. App. Answer & Brief at 1, and Ill. Answer at 1)

How The Federal Questions were Presented

Petitioner asserted its interrelated Federal claims at every appropriate level of the Illinois court system.

At trial, when Dennis Korando was called as a witness, there was no objection by respondent to his testimony on grounds of prejudice. Thus, respondent waived the alleged error on which the court based its order of a new trial. Respondent sought a new trial by means of a post-trial motion which was allowed by the court. The argument of counsel on the motion was not recorded, but the Federal claims raised here were vigorously argued to the trial court at that time.

In the Illinois Appellate Court, petitioner presented its Federal claims by arguing in its petition seeking leave to appeal that the trial court had erred in granting a new trial in violation of the purpose of the Federal Employers' Liability Act, the Seventh Amendment to the United States Constitution and

Rogers v. *Missouri Pacific R.R. Co.*, 352 U.S. 500, 509, 77 S.Ct. 443, , 1L. Ed. 2d 493, 501, (1957). Petitioner also expressly argued that, even if the testimony regarding the red-wigged, black individual was inadmissible, it was not properly objected to, was isolated and completely harmless in view of the overwhelming nature of the other testimony in the case — particularly that of Euwald Milkert who testified that plaintiff's alleged fall did not occur. (Ill. App. Pet., pp. 32-35) The Illinois Appellate Court thereafter allowed the petition for leave to appeal and the issue was again raised in the appellate court in appellant's brief (Ill. App. brief, pp. 34-37). In its unpublished decision, the appellate court held that no legitimate purpose could be served by Korando's testimony, therefore, a specific objection to the testimony on grounds of surprise was unnecessary. (Slip opinion at A-7) Although the trial court attempted to avoid the question of sufficiency of evidence in granting a new trial, the Illinois Appellate Court stated that respondent's objection to Korando's testimony on grounds of surprise was "sufficient to preserve plaintiff's challenge of the sufficiency of the evidence in his motion for a new trial." (Slip opinion at A-7) The court expressly passed on the questions presented herein. (Slip opinion at A-7-A-8)

The objection to usurpation of the jury's function was again raised in the petition for leave to appeal to the Illinois Supreme Court. (Ill. Pet., pp. 42-46). Essentially the same argument concerning usurpation of the jury's function and waiver was made by petitioner at the post-trial motion hearing and at each level of review subsequent to the trial court's granting of a new trial.

The petition for leave to appeal to the Illinois Supreme Court was denied on January 30, 1981. Thus, the Illinois Appellate Court, Fifth District, is the "highest court in [the] state in which decision could be had." 28 U.S.C. § 1257.

REASONS FOR GRANTING THE WRIT

1. This Court has Recognized Its Obligation to Correct Improper Administration of the FELA so as to Preserve Federal Constitutional and Statutory Guarantees of the Right to a Jury Determination.

The jury's verdict in favor of the petitioner and against the respondent is based on conflicting evidence consisting of the plaintiff's version of his alleged fall as opposed by the testimony of an attentive eye-witness, Euwald Milkert, who said respondent did not slip or fall from the locomotive engine. In the past, this Court has repeatedly stated that the litigants' right to a jury trial is to remain undisturbed under the Federal Employers' Liability Act and will be jealously guarded by this court which will exercise its power of review in any case where it appears that the litigants have been improperly deprived of the jury's determination. E.g., *Rogers* v. *Missouri Pacific R.R. Co.*, 352 U.S. 500, 509, 77 S.Ct. 443, , 1 L. Ed. 2d 493, 501, (1957); *Tiller* v. *Atlantic Coastline R.R. Co.*, 318 U.S. 54, 67-68, 63 S.Ct. 444, , 87 L. Ed. 610, 618, (1943); *Bailey* v. *Central Vermont Ry. Co.*, 319 U.S. 350, 353-354, 63 S.Ct. 1062, , 87 L. Ed. 1444, 1447-1448, (1943); *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 32-33, 64 S.Ct. 409, , 88 L. Ed. 520, 524, (1944); *Harris* v. *Pennsylvania R.R. Co,* 361 U.S. 15, 80 S.Ct. 22, 4 L. Ed. 2d 1, (1959). In the instant case, the trial court granted a new trial after hearing the jury's verdict because, allegedly, the testimony of Dennis Korando which directly refuted plaintiff's credibility and testimony concerning physical condition raised an inference of black homosexuality. Respondent's objection to that testimony, however, was untimely in that it was not made at the time the testimony was given. At no time did respondent move to strike the testimony or have the jury instructed to disregard it. Instead, respondent objected to the testimony on grounds of prejudice for the first time only when he learned what the jury's verdict was. In fact, the supposed prejudicial inference objected to at that late time was isolated

and entirely harmless in that it consisted of a single remark by Korando as to the fact that he did not know whether an acquaintance waiting for respondent in a car outside the railroad yard was male or female. Korando was only able to describe the individual as large middle-aged black person wearing a red wig. (R. 192)

It is settled that litigants in FELA cases have a paramount right to determination of disputed factual issues by a jury under the Seventh Amendment to the United States Constitution. In this case, the trial judge expressly found that the respondent's credibility was the major issue in the case. In a chambers conference, the trial judge repeatedly expressed his major concern with the respondent's credibility. (R. 172D; 172F; 172G-H) He expressly held that the question of how respondent got to work and who brought him to work was relevant. (R. 172G) Thereafter, Dennis Korando gave his description of the person waiting for respondent outside the railroad yard — the person believed by petitioner to have brought respondent to work shortly before. At no time thereafter did the court reverse its finding of relevance as to the identity of the individual waiting in an automobile. Respondent neither denied that the individual in an automobile existed nor did he disclose the identity of that individual.

The only timely objection which respondent made to Korando's testimony was that he was surprised by Korando's presence as a witness. At no time during the trial did plaintiff object or move to strike Korando's testimony on the specific ground that it was prejudicial or that such prejudice outweighed the testimony's probative value. (R. 172) At no time did plaintiff move to have the jury instructed to disregard the testimony nor did he move for a mistrial. Instead, in his closing argument, respondent's attorney grossly exaggerated the isolated reference to the bewigged black person in a car. He called the black man a "creature" (R. 365), and a "black thing" with a wig. (R. 368) Respondent's attorney's entire closing argument was infected

with grossly offensive racial references. In contrast, petitioner's attorney engaged in no such racial references and stated that his fear of prejudice was that virtually everyone in the community had a grievance against the railroads, the major industry in the community. (R. 392-393, 406-407 & 421)

The venue in which the instant action was filed is a major FELA forum with substantial verdicts often being obtained against the railroads doing business in that area. [2] Railroading is a major industry in that forum and, because of public inconvenience caused by railroad operations there, it is not difficult to inflame the passions of jurors by alleging misconduct or unfairness by a railroad. Such arguments were engaged in by respondent's counsel in this case on the fiction that the petitioner railroad fabricated a story about the red-wigged black person waiting in a car. Respondent's attorney grossly exaggerated the single reference to the red-wigged black person, apparently under a delusion that the jury would be swayed by that irrelevant and grossly improper and exaggerated closing argument. Careful review of the record discloses that petitioner did not in any way make an issue of the fact that plaintiff was a black man or of the supposed inference of black homosexuality which was described in respondent's post-trial motion. (R. 392-395) On the contrary, Korando's testimony and the lack of specific objections on grounds of prejudice disclose that the suggested inference of black homosexuality which, if even arguably present, was solely a figment of the imagination of respondent's attorney as evidenced by his closing argement. By repeatedly characterizing the red-wigged black man as a "creature" or "thing" (R. 172A) the respondent's attorney himself raised an inference of

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[2] The FELA gives plaintiffs extraordinary forum shopping opportunities in that suit may be instituted in the district of defendant's residence, the district in which the cause of action arose or in any district wherein the defendant is "doing business." 45 U.S.C. § 56. Suit may be brought in Federal or State court with removal being prohibited. 28 U.S.C. § 1445(a).

racial prejudice or wrongdoing by the respondent to which neither Korando nor petitioner's attorney contributed. After unsuccessfully using offensive racial characterizations as a sword in the crassest of trial strategies, respondent should not now be permitted to use the tactic as a shield with which to obtain a new trial by falsely accusing petitioner of injecting prejudicial inferences in the trial.

2. The Decision Below Is Contrary To Applicable Decisions Of This Court And Is Erroneous.

In this case, based on the eye-witness testimony of Euwald Milkert as to the fact that plaintiff did not slip or fall from the locomotive engine, it is apparent that there is an evidentiary basis for the jury's verdict. The fact that plaintiff's credibility was seriously controverted (and was even doubted by the trial judge in an in-chambers conference) further highlights the evidentiary basis for the determination by the jury. This Court's decisions indicate that, where there is an evidentiary basis for the verdict, the jury decision is to be respected. E.g., *Dennis* v. *Denver & Rio Grande Western R.R. Co.*, 375 U.S. 208, 210, 84 S.Ct. 291, ____, 11 L. Ed. 2d 256, 258, (1963); *McBride* v. *Toledo Terminal R.R. Co.*, 354 U.S. 517, 77 S.Ct. 1398, 1 L. Ed. 2d 1534, (1957); *Dice* v. *Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 363, 72 S.Ct. 312, ____, 96 L. Ed. 398, 404, (1952); *Myers* v. *Reading Co.*, 331 U.S. 477, 478, 67 S.Ct. 1334, ____, 91 L. Ed. 1615, 1616, (1947). With an evidentiary basis supporting the jury's verdict in this record, careful scrutiny should be given to the trial judge's grant of a new trial on a non-existent ground entirely waived by respondent.

In this case, the issue must be viewed as whether or not the trial judge can order a new trial on grounds of prejudice not raised in timely fashion where the trial judge has never overturned his earlier finding that the evidence is relevant. As this Court noted in *Lavender* v. *Kurn*, 327 U.S. 645, 654, 66 S.Ct. 740, ____, 90 L. Ed. 916, 923, (1946), rulings on the admissibility of

evidence must normally be left to the sound discretion of the trial judge in FELA cases. In this case, the Illinois Appellate Court assumed that the testimony of Dennis Korando was not admissible for any purpose (Slip opinion at A-7), but that assumption is not at all correct since the trial court very bluntly stated that the question of who brought plaintiff to work on the morning of his injury was relevant to his sleepiness and mental state at the time of the alleged injury. (R. 172G-I) By never reversing himself on the question of admissibility and relevance, the trial judge did nothing less than usurp the jury's findings on the ultimate question of fact when he ordered a new trial.

3. By Failing To Timely Object To Allegedly Prejudicial Testimony, Respondent Waived The Sole Ground For Ordering A New Trial.

Assuming for purposes of argument that Korando's testimony was erroneously admitted, it should be recognized that, in order to preserve an allegation of error in the admission of evidence, specific grounds supporting the objection must be stated and the failure to make such a timely objection, for whatever reason, is sufficient to negate the allegation of error. *Estelle* v. *Williams,* 425 U.S. 501, 509-513, 96 S.Ct. 1691, ____, 48 L. Ed. 2d 126, 134-135, (1976); *Johnson* v. *Bennett,* 395 Ill. 389, ____, 69 N.E.2d 899, 903-904, (1946). Under our adversary system, litigants are bound by the trial judgments of counsel under threat of waiver. *Wainwright* v. *Sykes,* 433 U.S. 72, 91, 97 S.Ct. 2497, ____, 53 L. Ed. 2d 594, 610-611 (1977). The underlying policy behind the requirement of specific and timely objections is the view that the trial judge commits no error unless the proper ground of objection is brought to his attention, and in part upon the possibility that if properly stated, the objection might be corrected or obviated at trial. Clearly, *Handbook on Illinois Evidence,* § 1.12, at 9-10, (1956).

Under Illinois law, if a specific objection is made (as in the instant case where surprise was the ground for respondent's objection in chambers), it is a waiver of all grounds not specified

or, in other words, one ground cannot be urged at trial and another on appeal. *Forest Preserve District* v. *Lehmann,* 388 Ill. 416, ____, 58 N.E.2d 538, 545, (1945). In cases where the grounds for objection may not be apparent until after the evidence has been given, a motion to strike is appropriate and should be promptly made. Cleary & Graham, *Handbook on Illinois Evidence,* § 103.3, at 7-8, (3d ed., 1979). In the instant case, by failing to enter a timely and specific objection to Korando's testimony on grounds of prejudice, respondent should be deemed to have waived the alleged issue. By failing to properly object, and then by raising a specter of racial prejudice in his closing argument, it appears that respondent's counsel made a deliberate tactical decision to accuse the petitioner of racial prejudice in the hope that such an inflammatory issue would appeal to the jurors.

4. The Questions Are Important.

Neither an academic question nor a determination on the question of whether the evidence was sufficient to support the jury verdict is involved herein. The question is whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected. At issue is the Congressional policy that juries determine liability in cases brought under the FELA. As was stated in *Rogers* v. *Missouri Pacific R.R. Co.,* 352 U.S. 500, 510, 77 S.Ct. 443, ____, 1 L. Ed. 2d 493, 502, (1956): "Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination."

The teaching of *Rogers* does not only apply where the plaintiff is complaining of usurpation of the jury function. As Mr. Justice Harlan noted in his dissent in *Harris* v. *Pennsylvania R.R. Co.,* 361 U.S. 15, 27-28, 80 S.Ct. 22, ____, 4 L. Ed. 2d 1, 9, (1959), this Court should frankly announce the intended scope of judicial supervision of jury verdicts in FELA cases and it should give expression to meaningful standards to guide the lower courts in the exercise of their supervisory function.

The instant case falls squarely within the confines of this Court's teaching in *Rogers* and its progeny. A mere review of evidence is not sought — rather, a meaningful enunciation of standards by which the lower courts are to be guided is sought, especially in cases where waiver of alleged errors is present.

CONCLUSION

The issues raised in this petition are fundamental to the functioning of jury trials under the Federal Employers' Liability Act and to the uniformity of judgments secured under that Federal scheme. There is general importance of a recurring nature on the question of whether or not a trial judge may overrule the jury's fact finding by granting a new trial on an issue not preserved in the record and which, in fact, has been created by the respondent's attorney in closing argument. Petitioner does not merely seek correction of what it deems to be a manifest error in the lower court decisions — it seeks an end to the subtle erosion of statutory and judicial principles evolved during the life of the Federal Employers' Liability Act. Petitioner accordingly prays that the Court allow this petition for writ of certiorari.

Respectfully submitted,

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April, 1981

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APPENDICES

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APPENDIX A

No. 78-410

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

Ulecious Buchanan,
Plaintiff-Appellee,

v.

Alton & Southern Railway Company, a Corporation,
Defendant-Appellant.

Appeal from the Circuit Court of Madison Count
Honorable William L. Beatty, Judge Presiding.

KASSERMAN, J.

ORDER

(Filed September 19, 1980)

This is an appeal from an order of the Circuit Court of Madison County granting a new trial. Plaintiff, Ulecious Buchanan, brought an action under the Federal Employer's Liability Act (45 U.S.C.A. § 51 *et seq.* (1972)) against Alton & Southern Railway Company for damages arising out of injuries allegedly occasioned by the negligence of defendant. The case was tried before a jury, and a verdict was returned in favor of defendant. Plaintiff filed a post-trial motion which included several assignments of error and sought to have the judgment entered on the verdict vacated and a new trial granted. The trial court granted the motion and ordered a new trial on the sole ground that certain prejudicial and immaterial evidence had been improperly admitted at trial. Pursuant to Supreme Court

Rule 306 (Ill. Rev. Stat. 1979, ch. 110A, par. 306), we granted defendant's petition for leave to appeal from the order granting a new trial.

At trial, plaintiff testified to the following sequence of events. On February 22, 1976, plaintiff drove his automobile to his girlfriend's house in East St. Louis, Ilinois, and then walked four blocks to work, arriving approximately 6:45 a.m. He was employed by defendant and assigned to its railroad yard in East St. Louis. His job classification was that of a hostler's helper, and his duties consisted of servicing locomotives. Servicing included refueling and resanding (engines require sand for braking), replenishing drinking water stored in engine cabs, and removing dirt and debris from the cabs. On this particular morning, plaintiff serviced three Penn Central engines which were coupled together and parked on a maintenance track. After the last cab was serviced, he began to dismount from the engine. To dismount he faced the engine, gripped two steel handrails flanking a series of steps and descended one step at a time. As he neared the last step, his foot slipped and he fell off the engine backwards, striking his back against a roundhouse wall and the ground. He attributed the fall to accumulations of grease and oil which rendered the steps slick. He lay on the ground a few minutes before entering the roundhouse to report his injury to his foreman, Euwald Milkert. Plaintiff complained at trial of pain in his lower back and left leg. He denied being tired or suffering from any physical ailment prior to the accident that morning. He also denied that prior to the accident he was discovered sleeping in the cab of a Norfolk & Western engine by Milkert.

Euwald Milkert, testifying on behalf of defendant, presented a different version of the events which transpired that day. According to Milkert, plaintiff appeared tired and sleepy when reporting to work. Also, plaintiff was unusually loud and made exaggerated movements with his arms. At approximately 9 a.m. Milkert made a search of the yard to locate plaintiff only to

discover him sleeping in the cab of a Norfolk & Western engine. Milkert shook plaintiff by the shoulder to wake him and ordered him off the engine, and plaintiff climbed down without incident. According to Milkert, the two men then walked directly to the locomotive shop, and once inside the shop the plaintiff sat in a chair, at which time he complained to Milkert for the first time about a back problem.

Of particular significance to this case is Dennis Korando's testimony which was received over plaintiff's objection. Korando, a foreman working the shift preceding plaintiff's, testified as follows:

> "Q. [Defense counsel] Where did you see him [plaintiff], for the first time, that morning?
>
> A. At 6:30 a.m., Buck Buchanan entered the roundhouse area, and he said to me, 'Dennis, could you come over here a minute?' I was quite some distance from him, and I walked over to him, and he said, 'Dennis, how about doing me a favor?' He said, 'How about going outside and tell that guy or whoever he is that I have got to work today, and that I can't go with him.'
>
> Q. Um-hum.
>
> A. And I said, 'Okay,' so I walked outside, to the front of the roundhouse area, and there was a 1967 Chrysler [sic], with one individual inside, colored, approximately forty-five years old. Now, I'm not really sure whether it was male or female, to be very honest with you.
>
> Q. Why is that?
>
> A. Well, first of all he had a wig on, a real dark red wig, but in size, he was in excess of 230 pounds, approximately six foot two, six foot three, and I opened up the passenger side door, and I said, 'Buck Buchanan can't go with you today. There's no one to take his place, and he'll have to

stay here. He'll have to work the duration of the shift,' and, at the end of that statement, I looked at him, and he never said a word. I closed the door, and he took off, with no reply from him."

Following a jury verdict in favor of defendant, plaintiff filed a post-trial motion raising several grounds for a new trial. In the order granting the new trial the trial court stated:

"It is the finding of this Court that point 3 of plaintiff's Post-Trial Motion raises a meritorious issue and that the admission into evidence of testimony concerning an alleged 6'4", 230 pound, black individual adorned in a red wig raises a prejudicial and inflammatory inference of black homosexuality. In regard to point 3, plaintiff's Motion for a New Trial is granted."

Defendant contends that the trial court abused its discretion by ordering a new trial on the sole ground that the evidence raised a prejudicial inference of black homosexuality. We disagree.

July decisions cannot be overturned by the granting of a new trial merely because the trial court might have decided differently; rather, a verdict may be set aside only if the trial court is satisifed that the jury was affected by undue prejudice or passion or the verdict is totally unwarranted by the evidence. (*Torrez . Raag* (2d Dist. 1976), 43 Ill.App.3d 779, 357 N.E.2d 632; *Kahn* v. *James Burton Company* (1955), 5 Ill.2d 614, 126 N.E.2d 836.) Whether to allow or refuse a motion for a new trial is left to the sound discretion of the trial court since it observes the witnesses and hears the testimony firsthand, and its decision will not be disturbed by a court of review in the absence of a showing of a clear abuse of discretion. (*Harrison* v. *Chicago Transit Authority* (1st Dist. 1977), 48 Ill.App.3d 564, 363 N.E.2d 11; *Lukich* v. *Angeli* (1st Dist. 1961), 31 Ill.App.2d 20, 175 N.E.2d 796.) Moreover, the trial court is permitted greater latitude in granting a new trial than in denying one. *Torrez* v. *Raag*.

Based upon our examination of the record, particularly the testimony of Dennis Korando, we cannot say that it was a clear abuse of the trial court's discretion to grant a new trial. The specter of black homosexuality with respect to plaintiff, who is black, and the person in the automobile encountered by Korando is readily apparent from Korando's description of that person as a "colored," red-wigged individual whose sex could not be determined. This evidence was not material to the factual issues of this case and only served to prejudice defendant through a racial and sexual innuendo. Therefore, we cannot hold the trial court, which was present and could observe the impact of such testimony, in error for concluding that this testimony had a prejudicial and inflammatory effect on the jury. Thus, it was proper for the trial court to grant a new trial.

Defendant argues in the alternative that it was improper for the trial court to grant a new trial on the basis of an error not objected to. The record shows that plaintiff objected to Korando's testimony only on the basis of surprise. Defendant therefore concludes that plaintiff was precluded from requesting a new trial on the basis of the prejudicial impact Korando's testimony may have had on the jury.

The grounds for an objection should be definitely and plainly stated in all fairness to the trial court and to the opposing party. (*DeMarco* v. *McGill* (1948), 402 Ill. 46, 83 N.E.2d 313.) Where there is no objection or proper preservation of error, the trial court cannot grant a new trial on a later allegation of error. (*Boone* v. *Baker* (1st Dist. 1972), 9 Ill.App.3d 509, 292 N.E.2d 461.) The ramifications of a specific objection which has been overruled are set forth by Wigmore as follows:

> "(2) *Specific Objection.* A specific objection *overruled* will be effective to the extent of the grounds specified, and no further. An objection *overruled,* therefore, naming a ground which is untenable, cannot be availed of because there was *another and tenable ground which might have been named* but was not:

* * *

> Here, also, however (as with a general objection), it would seem that the objection overruled will be effective, though naming an untenable ground, if there is *no purpose at all* for which the evidence could have been admissible * * *." *1 Wigmore on Evidence,* § 18 (3d Ed. 1940).

In the instant case, plaintiff specifically objected to Korando's testimony on the basis of surprise. Ordinarily any objection as to prejudice or other grounds would have been waived. However, the testimony in question is both highly prejudicial and immaterial to any issue in the case. Since no legitimate purpose could have been served by this evidence, the specific objection as to surprise was sufficient to preserve plaintiff's challenge of the sufficiency of the evidence in his motion for a new trial.

Finally, defendant contends that the trial court, by ordering a new trial, usurped the function of the trier of fact in violation of defendant's seventh amendment rights and of the purpose behind the Federal Employer's Liability Act.

Defendant states in its brief:

> "Where there is no unfair prejudice having a direct effect on the verdict of the jury, that verdict should be deferred to in an F.E.L.A. case because the right to a jury determination is part and parcel of the F.E.L.A. remedy. (*Boeing Company* v. *Shipman* (5th Cir. 1969), 411 F.2d 365, 386, 388; *Calabritto* v. *New York, New Haven & Hartford R.R. Company* (2d Cir. 1961), 287 F.2d 394, 395; *Arnold* v. *Panhandle & Santa Fe Railway Company* (1957), 353 U.S. 360, ____, 77 S.Ct. 840, ____, 1 L.Ed.2d 889, 891 (per curiam); *McBride* v. *Toledo Terminal R.R. Company* (1957), 354 U.S. 517, ____, 77 S.Ct. 1398, ____, 1 L.Ed.2d 1534, ____ (per curiam)."

We have already noted that Korando's testimony was highly prejudicial and that the trial court could properly have concluded that such testimony would have directly influenced the jury. Therefore, under the standard enunciated by defendant, the trial court did not improperly invade the province of the jury by ordering a new trial.

Finding that a published opinion in this case would have no precedential value, we affirm the order of the trial court granting a new trial pursuant to Supreme Court Rule 23 (Ill. Rev. Stat. 1979, ch. 110A, par. 23).

AFFIRMED.

HARRISON and SPOMER, JJ., CONCUR.

APPENDIX B

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

January 30, 1981

Mr. John B. Gunn
Attorney at Law
4343 West Main St.
Belleville, IL 62223

No. 54103 Ulecious Buchanan, respondent, vs. Alton & Southern Railway Company, a Corp., petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

UNITED STATES OF AMERICA

State of Illinois }
Supreme Court } ss.

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the twelfth day of January in the year of our Lord, one thousand nine hundred and eighty-one, within and for the State of Illinois.

Present: Joseph H. Goldenhersh, Chief Justice

Justice Robert C. Underwood Justice Daniel P. Ward

Justice Howard C. Ryan Justice William G. Clark

Justice Thomas J. Moran Justice Seymour Simon

Tyrone C. Fahner, Attorney General

Louie F. Dean, Marshal

Attest: Clell L. Woods, Clerk

BE IT REMEMBERED, that, to-wit: on the 30th day of January, 1981, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

Ulecious Buchanan,
Respondent

No. 54103 vs.

Alton & Southern Railway Company, a Corporation,
Petitioner

Petition for Leave to Appeal from Appellate Court
Fifth District 78-410, 76 L 560

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by him in this behalf expended, to be taxed, and that he have execution therefor.

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this day of , 19

Clerk,

Supreme Court of the State of Illinois.

APPENDIX C

NO. 54103

IN THE SUPREME COURT OF ILLINOIS

Ulecious Buchanan,
Plaintiff-Respondent,

vs.

Alton & Southern Railway Company, a corporation,
Defendant-Petitioner.

Appeal from the Appellate Court, Fifth District No. 78-410,
There on Appeal from Circuit Court, Third Circuit,
Madison County, Illinois, No. 76 L 560

ORDER
(Filed Feb. 18, 1981)

And now on this day, having duly considered the Motion for Stay of Mandate heretofore filed by the petitioner, Alton & Southern Railway Company, and being now fully advised of and concerning the premises, it is ordered that the Mandate in this cause be stayed pursuant to Supreme Court Rule 368(c) pending petitioner's filing of a Petition for Writ of Certiorari in the Supreme Court of the United States.

Enter: February 16, 1981

/s/ Joseph H. Goldenhersh
Chief Justice

APPENDIX D

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Ulecious Buchanan,
Plaintiff,

v.

Alton & Southern Railway Company, a Corporation
Defendant.

ORDER
(Filed September 18, 1978)

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Order of this Court, dated September 1, 1978, granting plaintiff's Motion for a New Trial is vacated.

It is the finding of this Court that point 3 of plaintiff's Post-Trial Motion raises a meritorious issue and that the admission into evidence of testimony concerning an alleged 6'4", 230 pound, black individual adorned in a red wig raises a prejudicial and inflamatory inference of black homosexuality. In regard to point 3, plaintiff's Motion for a New Trial is granted.

IT IS FURTHER found that the remaining points raised in plaintiff's Motion for a New Trial are without merit. With regard to those points, the Motion for a New Trial is denied.

ENTER:

/s/ W. L. Beatty
Judge

DATED: Sept. 10, 1978

APPENDIX E

Excerpts from the Trial Record

(R. 45C)

THE COURT:

I think the sleepy bit can go in. You've told me and the way I read the depositions and everything, you have evidence that this man was asleep, sound asleep just a matter of seconds, 30 seconds before the accident. I think that's admissible and since that is admissible and since he denies that he was asleep then I think as far as his credibility is concerned the fact that he was up until 2:00 in the morning the morning before becomes admissible.

* * *

(R. 53)

RESPONDENT'S ATTORNEY:

What happened after that?

RESPONDENT

After I got through I walked up and I came out the door and turned to the catwalk and prepared to dismount from the engine. I turned around, placed both hands on the handrails and proceeded down the ladder and as I got about the second or third step from the bottom I slipped and fell.

* * *

(R. 223-225)

EUWALD MILKERT:

- and we did come down off of the locomotive. I came off of the locomotive first. For safety's sake, when a person is getting

on a locomotive, he is to face the locomotive, holding on to the handrails, and climbing the steps up, and coming down the rule is the same, that you face the locomotive, hold on to the handrails, and come down backwards.

PETITIONER'S ATTORNEY:

All right, is that the manner that you got off of the locomotive?

EUWALD MILKERT:

That is the manner, in which I got off of the locomotive, and I stood, at the corner of the locomotive, right at the step, waiting for Mr. Buchanan to come down the steps.

PETITIONER'S ATTORNEY:

All right, did you watch him come down the steps?

EUWALD MILKERT:

Yes, I did, sir.

PETITIONER'S ATTORNEY:

And how did he come down the steps?

EUWALD MILKERT:

He came down in the proper manner. He came down holding on to the handrails; he was facing the locomotive, as he should have; and he came down, as he should have.

PETITIONER'S ATTORNEY:

What difficulty, if any, did he have getting down off of that?

EUWALD MILKERT:

He had none.

PETITIONER'S ATTORNEY:

Where did you go, then?

EUWALD MILKERT:

After we were off of the locomotive, we went to the locomotive shop, and we walked into the shop, directly into the shop, and, as you walk through the side door, just a little bit off to the side, there's a small bench and a chair, where the machinist and the hostler - or which they can use to make out their reports, and that is where Mr. Buchanan sat. He sat on that chair. After a short while, he raised his arms up in the air (demonstrating) similar to this, not exactly, perhaps, shrugged his shoulders around a little bit, got up off of the chair, and walked from the west end of the locomotive shop, along "D" track, beside - or between "D" track and the south wall of the shop, walked full length of the locomotive shop, turned around and came back, sat down in the seat again, and just a short time after that, he told me that his back was hurting him.

PETITIONER'S ATTORNEY:

What, if anything, did he tell you about how he had hurt his back?

EUWALD MILKERT:

I asked him how he hurt his back, and he said, 'Getting off of those PC [Penn. Central] units, pointing to the N & W units that we had just gotten off of.

PETITIONER'S ATTORNEY:

All right, and what was your response to that if anything?

EUWALD MILKERT:

I told him that it could not have been PC units, because those were N & W's that we had just gotten off of, and he said,

'Well,' - in effect, he said that doesn't matter, that's where I got hurt.

RESPONDENT'S ATTORNEY:

Excuse me. Your Honor, what he said, in effect, I don't think is -

THE COURT:

Sustained.

* * *

(R. 172A)

In Chambers:

RESPONDENT'S ATTORNEY:

* * * I had just had the opportunity of talking with Mr. Korando and he tells the fairly outrageous story that Mr. Buchanan was dropped off that morning at the railroad yards by a 239 pound, 6 foot 4 redheaded creature, red wigged creature and Mr. Buchanan asked Mr. Korando to tell the creature that he couldn't leave with it. I just think in light of the testimony, the effect that that testimony would have on the jury, I think it's very legitimate to claim surprise and move the witness be precluded from testifying without an opportunity for me to talk to him for a minute or so before he takes the stand. Even without an opportunity to talk to him dispite [sic] the fact that I saw him for a minute or 2, I don't think that's enough, that there is just too much work that would have to be done in light of his testimony, that surprise is an understatement.

* * *

(R. 172B-C)

PETITIONER'S ATTORNEY:

Yesterday in talking to Mr. Kelly and Mr. Milkert last night. I learned about the fact that Mr. Korando had seen the plaintiff. Now, I didn't really attach much significants [sic] to it at that point. So he saw him that morning, no big deal, a lot of people probably saw him and I assumed he drove. You know, he said he drove there. He didn't say he physically drove the car. He could have been a passenger and there again it didn't become an issue until he said he parked his car at his girlfriend's house. Incidently [sic], that's a different car then the one this witness described being there. You're talking about the defendant not revealing the name of a witness, there's an individual that if you believe the foreman has never been disclosed by the plaintiff, you have never named the individual or * * *.

* * *

(R. 172D)

PETITIONER'S ATTORNEY:

* * * I'm talking about how the guy got there and there is a witness that may or may not be produced but it's in direct conflict with what the plaintiff says.

THE COURT:

There's two things that bother me about this. I mean, it looks at least like there is certainly a possibility that your client is lying like a trooper under oath.

* * *

(R. 172D)

PETITIONER'S ATTORNEY:

It makes a lot of difference. Again, it goes to the credibility of a plaintiff in anything that he does. If he's going to testify as a

witness in his own behalf as to what happened to him, his ability at the time, his sences [sic] at the time, all of these things reflect on his credibility to respond to that question and say what he was doing. If this guy gets on the stand and gives the greatest story in the world and gives it minute detail, if he can show he was dead drunk at the time that reflects on the credibility of his story if he's drunk, how he can remember. If he's dead tired how can he remember all the things? It goes to his physical condition just before this accident happened.

* * *

(R. 172E)

THE COURT:

You're saying your client can lie under oath and take advantage of it.

* * *

(R. 172F)

THE COURT:

I mean, there's only so much lying that you can tolerate in one case, gentlemen. I mean, let's face it, if the guy is sitting there not telling the truth why the hell should he be given any advantage.

* * *

(R. 172G-H)

THE COURT:

It seems to me that while the question of how he got to work or who brought him to work may not under ordinary circumstances be relevant or material, that we have a situation here where there is a complete conflict from the start to finish in the

entire story of the plaintiff's and the defendant's witnesses. The defendant's witnesses say that moments before the accident the man was sound asleep. He says he wasn't asleep and was alert. So, that means that means, as I analyze it, it means that the defendant then is entitled to produce evidence to show that he was asleep because certainly if he was asleep there may be, you know, contributary [sic] negligence to falling down the steps if he did fall. They say he didn't fall. In showing that he was asleep we get in the question of where he was that night, what time he went to bed and so we come up with another complete conflict. He says he drove to work, left the car at his girlfriend's house and walked 4 blocks, and there's a witness who said he didn't. You know, I think, as I said off the record, there is just so much stuff that you can sweep under the rug and after a while you have to let some of it come out. I'm going to let him testify. Now, as far as notice or anything like that, Mr. Gunn has represented to the court that he was not aware of this until yesterday and did not know all the details of it until this morning when the plaintiff testified and when just at recess he talked to this man. I don't think there is any, you know, he hasn't been withholding anything. If you want additional time to talk to him.

* * *

(R. 172I)

THE COURT:

If he's running around with a fag with a red haired wig on and how much sleep he has. May be the IPI instructions 105 or 104, by using common sence [sic], applies to judges as well as jurors. And I think this is certainly significant to me. Obviously someone is lying here. I don't know if it's your client, maybe these people, maybe they're lying, but that's what we have a jury to decide. It's not up to me to decide who is lying.

* * *

(R. 192)

DENNIS KORANDO:

At 6:30 a.m., Buck Buchanan entered the roundhouse area, and he said to me, "Dennis, could you come over here a minute?" I was quite some distance from him, and I walked over to him, and he said, "Dennis, how about doing me a favor?" He said, "How about going outside and tell that guy or whoever he is that I have got to work today, and that I can't go with him."

* * *

And I said, "Okay," so I walked outside, to the front of the roundhouse area, and there was a 1967 Chrysler, with one individual inside, colored, approximately forty-five years old. Now, I'm not really sure whether it was male or female, to be honest with you.

* * *

(R. 193)

DENNIS KORANDO:

Well, first of all he had a wig on, a real dark red wig, but in size, he was in excess of 230 pounds, approximately six foot two, six foot three, and I opened up the pasenger side door, and I said, "Buck Buchanan can't go with you today. There's no one to take his place, and he'll have to stay here. He'll have to work the duration of the shift," and, at the end of that statement, I looked at him, and he never said a word. I closed the door, and he took off, with no reply from him.

* * *

RESPONDENT'S ATTORNEY'S CLOSING ARGUMENT

(R. 364-365)

He knows that he fell, through no fault of his own, and there's no proof to the contrary, that he was not on a Penn Central. They tried that today. Mr. Martin came in, and said that he wasn't but Mr. Milkert came in and said contrary; he was on those cars, and I think there's a final issue, and I don't think, as I indicated, here I haven't tried as many law suits, as Mr. Gunn, but the fact that he brought in this Mr. Korando guy, to talk about this red headed creature, who was out on the parking lot, the day of this incident; now, what that had to do with Mr. Buchanan's falling, later in the day, totally escapes me. He brings in this Mr. Korando, who says he saw Mr. Buchanan, at 6:30, and then goes out, and there's this six foot three or six foot four, two hundred and thirty pound black, and he doesn't know if it's man, doesn't know if its male, with a red wig on. Now what - so what? I mean, I'm not sure, really, what kind of effect that was supposed to have on you, as tryers [sic] of the facts in this case, but I can only characterize it as a cheap shot. I don't think it's fair, to come in here and - tarring this man up, really, for no particular reason, and talking about this creature, with the red wig, has nothing to do with anything, in the issues of this law suit. This is a law suit. It's not a carnival. You've got to bring in information, that's relevant to the law suit. That's no more relevant than other injuries are, on this railroad yard. You can't talk about stuff like that.

* * *

(R. 368)

I think you can also consider just the whole relevancy of some of that evidence. I suppose I can't take personal offense, but I'm actually appalled, by the idea of this black thing with the wig, coming into this case; it's got nothing to do with anything. So you can consider, I think, the relevancy and discrepancy of

what was brought into this case. So, that's sort of the evidence, I suppose lack of evidence, the non-issues, that the railroad has produced here.

* * *

(R. 371-372)

He's never had any problem, and I can tell you this, that it seems to me that a railroad that can go find and drag somebody out of the woodwork, that's got a red wig on, can sure go and find out if this guy had job problems, and he didn't * * * [B]ut we're not dealing here, with a shiftless fellow or some black who's trying to take advantage of the system.

* * *

(R. 373)

Now, I think Mr. Buchanan realizes that it's, unfortunately, a white man's world, and his really only opportunity, a black, with a high school education, is to work and to work hard. Now, I'm not - I'm not trying to convert this into a civil rights law suit. I mean, there are always prejudices and always problems.

* * *

(R. 373)

I'm not from here, originally, is that [sic] there was a time, here in Granite City, when whites didn't come past 6th Street. You know, if you wanted the white kind of life, you couldn't come past 6th Street, and that kind of ____.

* * *

PETITIONER'S ATTORNEY'S CLOSING ARGUMENT:

(R. 392-393)

Now, one of the first things the court is going to instruct you on is that you don't base your verdict, that you finally decide, on any sympathy or prejudice, of any kind. Now, there's been a great deal of conversation about the fact that this plaintiff, in this case, is black. That's not an issue, in this law suit, to anything. It has been raised by the plaintiff. I haven't said anything about. I didn't question anybody about it on vior dire, and, as far as any kind of prejudice is concerned, I know, and we all know, that I don't imagine there's probably a worse defendant, as far as prejudice is concerned to come in and represent, than a railroad, because nobody likes railroads. They block people, at crossings; they make people unhappy. There's a lot of problems with that, so, if you want to talk about a natural prejudice, and I don't expect people - to be able to find twelve people, frankly, that are gonna get on a jury and not have any kind of grudge against the railroad; that's almost impossible, but what I do ask is that when you consider what you're gonna do, to try and leave that fact out and weigh the evidence that you heard. Talk about the evidence and the facts, the photographs, the documents. That's the kind of thing you're to base your evidence on, not speculation and conjecture, not guesswork and that type of thing. * * * You'll be told that you are the sole judges of a witness is telling you the truth or not. I don't decide it. The plaintiff's attorney doesn't decide that. You decide it, the twelve of you, * * *.

* * *

(R. 406-407)

He says that when he got there, for instance, that he parked his car at his girlfriend's house and walked four blocks to work. Now, it just so happens that we have the prior shift foreman, that just happened to see him, and Buchanan, at least by his

own story, says, 'Do me a favor and go out there and tell that guy that I can't go with him.' Now, I don't know who that guy was, and I'm not about to go looking for him, but I'll tell you one thing; to dream up a story like that is a pretty good one. I don't think I could to that well, if I tried to make it up, and I don't think any of the railroad workers could make up one like that. This guy is just another foreman, and, certainly, he might remember something like that, as it is just a little out of the ordinary, and, so, who that person was, we've never been told. The plaintiff has never told us about that. He's never denied it. He's never got on the stand and denied that that happened, and that could be a possible witness, as to where the plaintiff was, in those preceding four hours, that he says he was in bed. I don't know, and we get into that area of why I think it's important, in the case, and it's a real issue, in his contributory negligence, in the case. If he is dead tired, I think it's important to show, if he was up all night, or not up all night, or how little sleep he had. That's important for the defense to show that he doesn't have all of his faculties that morning, because of that, because of the drowsiness, and the fact that all of these people, who saw him, said that he was acting a little strange, when he reported there, that he was a little loud. He is a quiet fellow, apparently. He certainly hasn't made any noise, in this law suit, and he has testified quietly, and that, I guess, is his nature.

* * *

(R. 421)

As far as any of the evidence, again, getting back to the red wig thing, I can't help it that plaintiff's counsel doesn't think it's relevant. That is not my problem, but I can only say to you that we played by the rules, in this court, and, if it wasn't relevant, in some fashion, it wouldn't be in front of you, as a piece of evidence at all, to consider. So, there has to be some relvancy to it, and what relevancy is for you to decide. If it doesn't mean anything to you, fine, but I can tell you that the railroad certainly

didn't plant that individual out there that morning, just so we'd have this story two years later. I think that's a little ridiculous and incredible.

RESPONDENT'S ATTORNEY'S REBUTTAL ARGUMENT:

(R. 422-423)

One, I don't think I overemphasized that my client happens to be a black man. I think I would have been pretty remiss, if I hadn't talked to you about it, at the very beginning on the voir dire and so on. I think it's unfortunately a part of human nature, and I'm sure that Mr. Gunn has a lot of problems, in representing the railroad, and that it's a very difficult position and so on, but, nevertheless, I just wanted to bring out early-on that we are dealing with a black man, and that could have an effect on some people, and I trust, and we picked this group, and I don't think it will, in this case. I think we're dealing with fair minded and level headed people.